108-312

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. 1206.

ALEXANDER P. TUTTON, COLLECTOR OF CUSTOMS FOR THE DISTRICT OF PHILADELPHIA, PLAINTIFF IN ERROR,

vs.

ALONZO M. VITÉ AND FRANCIS A. VITÉ, TRADING AS VITÉ BROTHERS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

**FILED JANUARY 31, 1883.**

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1 UNITED STATES,
*Eastern District of Pennsylvania, set:*

The President of the United States to the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, greeting:

Because in the record and process and also in the rendering of judgment in a suit before you, between Alonzo M. Vité and Francis A. Vité, trading as Vité Brothers, plaintiffs, and Alexander P. Tutton, collector of customs for the district of Philadelphia, defendant, in a plea of trespass on the case, a manifest error has intervened, to the great damage of the said Alexander P. Tutton, as in his complaint has been stated, and as it is just and proper that the error, if any there be, should be corrected in due manner and that full and speedy justice should be done to the parties aforesaid in this behalf: You are hereby commanded that if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the honorable the justices of the Supreme Court of the United States, sitting at Washington, D. C., on the second Monday of October next, that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Philadelphia, this second day of November, A. D. one thousand eight hundred and eighty-two, and in the one hundred and seventh year of the Independence of the said United States.

[SEAL.] SAMUEL BELL,
*Clerk of Circuit Court U. S.*

2 THE UNITED STATES OF AMERICA, *ss:*

To Alonzo M. Vité and Francis A. Vité, trading as Vité Brothers, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, wherein Alexander P. Tutton, collector of customs for the district of Philadelphia, plaintiff, and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, shall not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand this 14th day of November, in the year of our Lord one thousand eight hundred and eighty-two.

WM. BUTLER, *Judge.*

I hereby accept service of the within writ for def'ts in error.

EDW. SHIPPEN,
*Att'y pro Def'ts in Error.*

Nov. 18, '82.

3 In the circuit court of the United States in and for the eastern district of Pennsylvania in the third circuit.

ALONZO M. VITÉ AND FRANCIS A. VITÉ, trading as Vité Brothers,
*vs.*
ALEXANDER P. TUTTON, COLLECTOR OF CUSTOMS for the district of Philadelphia.
No. 55. April sess., 1880.

UNITED STATES OF AMERICA,
*Eastern District of Pennsylvania, ss:*

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit. Of April session, 1880, No. 55.

It is thus contained:

Be it remembered that on the 23rd day of June, A. D. 1880, came the said defendant by his attorney, John K. Valentine, esq., and filed in the clerk's office of said court his petition for a writ of certiorari herein, which said petition is in the words and figures following, to wit:

4 In the circuit court of the United States for the eastern district o Pennsylvania, in the third circuit.

The petition of Alexander P. Tutton, collector of customs for the district of Philadelphia, respectfully represents:

That a suit has been commenced by summons case against him as defendant by Alonzo M. Vité and Francis A. Vité, trading as Vité Brothers, in the court of common pleas No. 3 for the county of Philadelphia, in the State of Pennsylvania, to June term, 1880, No. 636.

That the said suit is brought on account of an act done by him under the revenue laws of the United States, as collector of the customs for the district of Philadelphia, the said suit being to recover a certain sum of money paid for and on account of the said plaintiffs to the said defendant, as collector aforesaid, as duties on certain merchandise.

Your petitioner respectfully prays that the said cause may be entered on the docket of your honorable court, and proceeded in as a cause therein originally commenced, and that a writ of certiorari be immediately issued by the clerk of your honorable court to the said court of common pleas No. 3 for the county of Philadelphia, to send to the said circuit court of the United States the record and proceedings in said cause, according to the provisions of the act of Congress in such case made and provided.

And he will ever pray, &c.

A. P. TUTTON,
*Collector.*

Alexander P. Tutton, being duly sworn, says that the facts set forth in the above petition are true, to the best of his knowledge and belief.

A. P. TUTTON.

Sworn and subscribed before me this 19' day of June, 1880.

[SEAL.] E. H. BAILEY,
*Not. Pub.*

I hereby certify that as counsel for the above petitioner I have examined the proceedings against him, and carefully enquired into all the matters set forth in the above petition, and that I believe the same to be true.

JOHN K. VALENTINE,
*Att'y for Def't.*

(Indorsed:) No. 55. April sessions, 1880. Circuit court United States, eastern district of Pennsylvania, in the third circuit. Alonzo M. Vité et al. vs. Alexander P. Tutton, collector, &c. Petition for certiorari. John K. Valentine, attorney for petitioner. Filed June 23, 1880.

5 And afterwards, to wit, on the said 23rd day of June, A. D. 1880, the court, upon motion of John K. Valentine, esq., defendant's attorney, allow a writ of certiorari to issue in the words and figures following, to wit:

6 UNITED STATES OF AMERICA,
*Eastern District of Pennsylvania, set.:*

The President of the United States to the honorable the judges of the court of common pleas No. 3 for the county of Philadelphia & State of Pennsylvania, greeting:

Whereas lately in your said court of common pleas No. 3 for the county of Philadelphia suit was brought against Alexander P. Tutton, collector of customs for the district of Philadelphia, by Alonzo M. Vité and Francis A. Vité, trading as Vité Brothers, of your June term, 1880, No. 636, which said suit, as it is said, is still pending before you in the said court of common pleas No. 3 undetermined; and whereas on the application of the said Alexander P. Tutton, collector, &c., to the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, on a suggestion, supported by proper evidence, that the said suit was brought on account of an act done by him under color of his office as collector of customs for the district of Philadelphia, the said suit having been brought to recover certain moneys paid by the said plaintiffs to the said Alexander P. Tutton, collector, &c., aforesaid, for duties on certain merchandise claimed to be due and owing from the said plaintiffs to the United States of America, and praying that a writ of certiorari may be immediately issued by the clerk of the said circuit court of the United States, directed to the said court of common pleas No. 3, to send to the said circuit court of the United States the record and proceedings in the said cause, according to the provision of the act of Congress in such case made and provided:

Wherefore you are hereby commanded to transmit, under your seal, the record and proceedings of the said suit, with all things thereunto relating, unto the said circuit court of the United States, to be holden at Philadelphia, for the eastern district of Pennsylvania, in the third circuit, on the first Monday of July next, plainly and distinctly, in as full and ample manner as it now remains before you, together with this writ, so that the said circuit court of the United States may be able therein to proceed and do what shall appear of right ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme

Court of the United States, at Philadelphia, this twenty-third day of June, A. D. 1880, and in the 104th year of the Independence of the United States.

[SEAL.] SAMUEL BELL,
*Clerk of Circuit Court, U. S.*

(Indorsed:) No. 55. April sess., 1880. Circuit court, U. S. Vité et al. vs. Tutton, collector, &c. Writ of certiorari. Brought into office June 25, 1880. Returned & filed August 30, 1880.

7 And afterwards, to wit, on the 30th day of August, A. D. 1880, the writ of certiorari was returned with the record annexed, which said record is in the words and figures following, to wit:

8 *Exemplification.*

PHILADELPHIA COUNTY,
*State of Pennsylvania, ss.:*

Among the records and proceedings of the court of common pleas No. 3 for the county of Philadelphia, State of Pennsylvania, the following may be found as matter of file and of record, at No. 636, June term, 1880, to wit:

*Docket entries, June term, 1880*

| | | |
|---|---|---|
| E. Shippen ..... 636. J. K. Valentine, 6, 15, '80. | Alonzo M. Viti and Francis A. Viti, trading as Viti Brothers, vs. Alexander P. Tutton, collector of customs for the district of Phila. June 25, 1880, certiorari from circuit court of U. S. brought into office. | Sum's case, exit June 15, 1880. Ret. 1st Mon., July, 1880, served. |

Certified from the record.
July 12th, 1880.
[SEAL.] E. J. LINDSAY,
*Pro. Proth'y.*

9 ALONZO M. VITI AND FRANCIS A. VITI, trading as Viti Brothers,
v.
ALEXANDER P. TUTTON, COLLECTOR OF CUSTOMS for the district of Philadelphia.
} C. P. No. , June term, 1880. No.

Please issue summons case in the above case, ret'ble 1st Monday of July next.

EDWARD SHIPPEN,
*Att'y pro Pl'ffs.*

To PROTH'Y, C. C. P.

(Endorsed:) 636. June term, 1880. C. P. No. 3. Alonzo M. Viti & Francis A. Viti, trading as Viti Brothers v. Alexander P. Tutton, collector of customs for the district of Philad'a. Præcipe for sum's case. Filed 6, 15, '80. E. Shippen, att'y pro pl'ff.

10 *Summons.*

COUNTY OF PHILADELPHIA, *ss:*

The commonwealth of Pennsylvania to the sheriff of Philadelphia County, greeting:

We command you that you summon Alexander P. Tutton, collector of customs for the district of Philadelphia, late of your county, so that he be and appear before our judges, at Philadelphia, at our court of common pleas No. 3 for the county of Philadelphia, to be holden at Philadelphia, in and for said county of Philadelphia, the first Monday of July next, there to answer Alonzo M. Viti and Francis A. Viti, trading as Viti Brothers, of a plea of trespass on the case, etc.; and have you then there this writ.

Witness the honorable James R. Ludlow, president of our said court, at Philadelphia, the fifteenth day of June, in the year of our Lord one one thousand eight hundred and eighty.

[SEAL.] F. C. MANDERSON,
*Pro Prothonotary.*

11 (Indorsed:) 636. June term, 1880. C. P. No. 3. Alonzo M. Viti and Francis A. Viti, trading as Viti Brothers, vs. Alexander P. Tutton, collector of customs for the district of Philadelphia. Summons case. E. Shippen, att'y pro pl'ff.

Served Alexander P. Tutton, by giving to him, June 18, 1880, a true and attested copy of the within writ, and making known to him the contents thereof.

So answers.

THOS. H. STOKLEY,
*Deputy Sheriff.*
ENOCH TAYLOR, *Sheriff.*

12 ALONZO M. VITÉ ET AL., TRADING, &C., *vs.* ALEXANDER P. TUTTON, COLLECTOR, &C. } C. P. No. 3. June term, 1880. No. 636.

The proth'y will enter my appearance for the defendant in the above. 6, 18, '80.

JOHN K. VALENTINE,
*Att'y for Def't.*

To PROTHY C. P.

(Endorsed:) No. 636. June T., 1880. C. P. No. 3. Alonzo M. Vité et al., trading, &c., vs. Alexander P. Tutton, collector, &c. Order for appearance. Filed June 18, '80. John K. Valentine, att'y for def't.

13 And afterwards, to wit, on the 28th day of March, A. D. 1881, the plaintiffs, by their attorney, Edward Shippen, esq., come into court here and file their declaration, which, being read, is as follows, to wit:

14 In the circuit court of the United States for the eastern district of Penn'a, of April term, 1880.

ALONZO M. VITI AND FRANCIS A. VITI, trading as Viti Brothers,
*vs.*
ALEXANDER P. TUTTON, collector of the port of Philadelphia.
} No. 55.

PHILADELPHIA COUNTY, *ss:*

Alexander P. Tutton, late of the county aforesaid, was summoned to answer Alonzo M. Viti and Francis A. Viti, trading as Viti Brothers, of a plea of trespass on the case, &c. Whereupon the said Alonzo M. Viti and Francis A. Viti, trading as Viti Brothers, by Edward Shippen, their attorney, complain:

15 For that whereas the defendant on the first day of June, in the year of our Lord one thousand eight hundred and eighty, at the county aforesaid, was indebted to the plaintiffs in fifty thousand dollars, for money then and there lent by the plaintiffs to the defendant at his request.

And also in the further sum of fifty thousand dollars, for money then and there paid by the plaintiffs for the use of the defendant at his request.

And also in the further sum of fifty thousand dollars, for money then and there had and received by the defendant for the use of the plaintiff.

And also in the further sum of fifty thousand dollars, for money found to be due from the defendant to the plaintiffs on an account then and there stated between them.

And also in the further sum of fifty thousand dollars, for interest then and there due and payable, for the forbearance by the plaintiffs at the defendant's request, for moneys before then due and owing from the defendant to the plaintiffs.

And the defendant afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, in consideration of the several last-mentioned premises, respectively then and there promised the plaintiffs to pay them the said several last-mentioned moneys respectively, on request; yet the defendant hath disregarded his promises, and hath not paid any of the said moneys, or any part thereof, to the damage of the plaintiffs fifty thousand dollars.

And therefore they bring suit, &c.

EDW. SHIPPEN,
*Attorney for Plaintiff.*

(Indorsed:) In the circuit court for the eastern district of Penn'a, April term, 1880, No. 55. Viti Brothers vs. Alexander P. Tutton, collector of the port of Philad'a. Narr. in assumpsit.

Prothonotary will enter a rule to plead in eight days, or judgment.

Sec. reg.

Filed March 28, 1881.

EDW. SHIPPEN,
*Attorney for Plaintiff.*

16 And afterwards, to wit, on the 25th day of August, A. D. 1881, the defendant, by his attorney, comes into our said court here and files his plea, which being read is as follows, to wit:

ALONZO M. VITI ET AL.
*vs.*
ALEXANDER P. TUTTON, COLLECTOR, &c. } C. C. U. S. E. D. of Pa. April sess. 1880. No. 55.

And the said defendant, by John K. Valentine, esquire, his attorney, comes and defends the wrong and injury when, &c., and saith that he did not undertake or promise in manner and form as the said plaintiffs have above thereof complained against him; and of this he puts himself upon the country.

JOHN K. VALENTINE,
*Att'y for Def't.*

17 (Endorsed:) 55. April sess., 1880. C. C. U. S. Alonzo M. Vité et. al. vs. Alexander P. Tutton, collector, &c. Plea. Filed August 25, 1881. John K. Valentine, att'y for def't.

And afterwards, to wit, on the 25th day of August, A. D. 1881, a commission on behalf of plaintiffs was issued to Carrara, Italy, which said commission having been returned, opened in open court, and filed on the 9th day of June, A. D. 1882, is in the words following, to wit:

18 In the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of April session, 1880, No. 55.

ALONZO M. VITÉ AND FRANCIS A. VITÉ, TRADING as Vité Brothers,
*vs.*
ALEXANDER P. TUTTON, COLLECTOR OF CUSTOMS for the district of Philadelphia.

The President of the United States to Giovanni Barrata, esq., city of Carrara, Italy:

Know ye that in confidence of your prudence and integrity we have given unto you, and by these presents do give unto you, Giovanni Barrata, esq., full power and authority, in pursuance of a rule lately made in the circuit court of the United States, in and for the eastern district of Pennsylvania, in the third circuit, in a certain action at law therein depending, wherein the said Alonzo M. Vité et al. are plaintiffs, and Alexander P. Tutton, collector of customs for the district of Philadelphia, is defendant, to call before you at a certain day and place, by you for that purpose to be appointed, all and every person and persons who may be named to you by the said plaintiffs as witnesses in the said action, and then and there to examine them on their respective oath or affirmation, on certain interrogatories, hereunto annexed, touching the premises, and to reduce their testimony to writing; and when you shall have so done, you are to send the same to the said circuit court, closed up and under your seals, plainly and distinctly set, together with this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Philadelphia, this twenty-fifth day of August, A. D. 1881, and in the 106th year of the Independence of the said United States.

[SEAL.]

SAMUEL BELL,
*Clerk of Circuit Court.*

19 ALONZO M. VITÉ AND FRANCIS A. VITÉ, trading as Vité Brothers,
*vs.*
ALEXANDER P. TUTTON, COLLECTOR OF THE port of Philadelphia.

And now, this twenty-fifth day of June, A. D. 1881, on motion of Edward Shippen, esq., rule granted on defendant to show cause why a commission should not issue to take depositions of witnesses at Carrara, in the Kingdom of Italy, returnable on eighth day of July, A. D. 1881 next.

20 ALONZO M. VITÉ AND FRANCIS A. VITÉ, trading as Vité Brothers,
*v.*
ALEXANDER P. TUTTON, COLLECTOR OF THE port of Philadelphia.

1st. What is your name, age, residence, and occupation?

2. If you state that you are a professional sculptor, please state how long you have been occupied as such and where.

3. Did you or did you not ship to Vité Brothers at Philadelphia, on board the Santina Ansaldo, in the year 1879, and in what month, three cases of statuary in marble, and were not said cases marked 1074, 1076, and 1077; and if so, what was their contents; specify the
21 same particularly?

4. If you say that you shipped the said cases, please state from whose original models they were sculptured.

5. State if the artist of the original model is a professional sculptor, and what is his reputation as such; is he recognised in the profession of sculptor in Carrara as a professional sculptor? State fully your knowledge as to the matter inquired of in this interrogatory fully and at large.

6. What was the original cost of the statuary in each of said cases, which you charged to said Vité Brothers for the same.

7. Did you or did you not, also in the year 1879, ship to said
22 Vité Brothers at Philad'a, on board of the Gustav Adolph, three other cases of statuary in marble, marked 1078, 1079, 1080, and if so, what was their contents? Specify the same particularly.

8. If you say that you shipped the said cases, please state from whose original model they were sculptured, and by whom.

9. State if the artist of said cast original model is a professional sculptor, and what is his reputation as such. Is he recognised in the profession of sculpture in Carrara as a professional sculptor? State fully your knowledge as to the matters inquired of in this interrogatory, fully and at large.

10. What was the original cost of the statuary in each of said
23 three cases which you charged said Vité Brothers for the same?

11. When were the models of the statuary in said six cases designed and executed?

12. Where was the statuary in said six cases executed, and by whom?

13. Where do Carlo Niccoli and Pierto Salada reside, and where do they execute their professional work?

14. Did or did not the said Nicoli graduate in any school or academy of art; if so, what school or academy?

15. Is or is not the said Nicoli a pensioner of the Government of Italy, and for what reason is he a pensioner?

16. Do you know whether the said Nicoli, is, in the course of his
24 profession, in the habit of making statuary after models created and originated by him and embodying the original conceptions of his own brain?

17. Do you or do you not know whether the statuary contained in the cases specified in interrogatory 7 were executed by Pietro Salada or any one else, and, if so, in whose studio, and were they not executed after models created and originated by the said Nicoli, after his own original conceptions, and were they in any respect copies from models of any other sculptor or sculptors, or from photographs or statues of any other sculptors?

18. Is the bill of lading annexed hereto the bill of lading of said shipment of statuary on board the Gustav Adolph?

19. Please examine the two original papers hereto annexed and
25 marked on the back of each respectively in red ink No. 5179 & 5180, entitled Sculptor's Declaration, with the consular certificate to each, and say are they both signed in the proper handwriting of Pietro Salada, and were they not sent to Vité Brothers, and did not said Pietro Salada declare and subscribe the same before Franklin Torry, at Carrara, as is certified by him, and did he not therefore place his seal and consular certificate thereto.

20. Do you know any other matter or thing in any way beneficial to the plaintiffs in this suit; and, if any, state the same fully and at length?

The plaintiffs name as commissioner Giovanni Barratta, of the city of Carrara, in the Kingdom of Italy.

ED'W SHIPPEN,
Per C. D. JENKIN,
*Att'y for Pl'ffs.*

26 Shipped in good order and well conditioned, by Pietro Salada, in and upon the good Nowr. bark called the Gustav Adolph, whereof is master for this present voyage Soresen, and now lying in the port of Leghorn and bound for Philadelphia, three cases marble works, meas'g I 1't 12.9, being marked and numbered as in the margin, and are to be delivered in like good order and well conditioned, at the aforesaid port of Philadelphia (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted, unto Messrs. Vité Brothers, or to their assigns, upon paying freight for the said goods eight American dollars per ton of 40 cp., with ten

(V A) 1079-1080.

per cent. damage and average accustomed. In witness whereof I, the said master or purser of the said ship, have affirmed to 4 bills of lading, all of this tenor and date, the one of which bills of lading accomplished, the other 3 to stand void.

Dated in Leghorn, the 23d October, 1879.

Weight, measurement, and contents unknown to

F. SORENSEN.

(Endorsed:) Pierto Salada.

(Endorsed:) 55. April, 1880. U. S. C. C. Vité Brothers vs. A. P. Tutton, collector of the port of Philadelphia. Interrogatories filed June 25, 1881.

ALONZO M. VITÉ AND FRANCIS A. VITÉ, trading as Vité Brothers,
*vs.*
ALEXANDER P. TUTTON, COLLECTOR OF THE PORT of Philadelphia.

C. C. U. S., Ap'l S., 1880, No. 55.

Cross-interrogatories to be propounded to witnesses to be called, sworn or affirmed, and examined on behalf of the plaintiffs under the commission issued in the above case.

First cross-interrogatory. State whether the statues in the six cases referred to in the plaintiffs' interrogatories as shipped to Vité Brothers at Philadelphia were original productions or copies of originals; and were they copied from a model designed by an artist, or from finished productions of an artist?

Second cross-interrogatory. If the said statues were copies of the original works of an artist, state the name of the artist who made the originals and the name of the artist who made the copies, and when and where they were made.

Third cross-interrogatory. If the six cases of statues were copies, state how many copies of such work had been made by the artist making the same.

Fourth cross-interrogatory. State whether the business of the person making the copies is to make copies or to create original works of art.

JOHN K. VALENTINE,
Per HORD GILPIN,
*Att'y for Def'd't.*

AUG. 10, 1881.

(Endorsed:) 55. Apl. S. C. C. U. S. E. D. of Pa. Viti Bros. vs. Tutton. Cross-interrogatories. Filed August 10, 1881. Jno. K. Valentine, att'y for d'f'd't.

United States circuit court, April, 1880.

VITI BROS.
*vs.*
A. P. TUTTON.
No. 55.

Whereas a commission has been duly issued in the above case to take

the testimony in Italy, at Carrara, with interrogatories annexed; and whereas interrogatory nineteen refers as follows to "two original papers annexed, and marked on the back of each, respectively, in red ink, the numbers 5179 and 5180, entitled Sculptor's Declaration, with consular certificates to each;" and whereas in the issuing of said commission the said original papers were not annexed: Now, this agreement witnesseth that the said original papers, which are hereto annexed, shall be transmitted to the commissioner named in the said commission, with this agreement, and the same shall be considered as if they were originally
33 annexed to the said commission, and that the same shall be affixed thereto by the commissioner and returned by him.

EDW. SHIPPEN,
*Att'y for Pl'ff.*

NOV'R 29, 1881.

JOHN K. VALENTINE,
*Attorney for United States.*

11, 29, '81.

34 *Sculptor's declaration.*

CARRARA, 20*th December*, 1879.

I, Peter Salada, sculptor, resident in Carrara, Italy, do hereby declare and affirm that I am a professional sculptor, and that the statue described in invoice dated August 10, 1879, with certificate No. 2624, viz, statue of Devotion, in case No. 1074; 2 figures, boy and girl, in case No. 1076; and figure of girl writing, in case No. 1077, all marked (V A) are my own professional production.

PIETRO SALADA, *Artist.*

*Consul's certificate.*

I, Franklin Torrey, consul of the United States of America at
35 Carrara, do hereby certify that Peter Salada, whose name is subscribed to the foregoing declaration and affirmation, has made the same before me this day in Carrara, is known to me to be a professional sculptor resident in Carrara.

In testimony whereof I have hereunto set my hand and seal of office, at Carrara, this 20th day of December, 1879.

[SEAL.] FRANKLIN TORREY, *Counsel.*

(Endorsed:) 6512 *c.*

36 *Sculptor's declaration.*

CARRARA, 20*th December*, 1879.

I, Peter Salada, sculptor, resident in Carrara, Italy, do hereby declare and affirm that I am a professional sculptor, and that the statue described in invoice dated October 27th, 1879, with certificate No. 2664, viz, three figures—Summer, Autumn, and Winter—in cases No. 1078, 1079, 1080, all marked (V A), are my own professional production.

PETER SALADA, *Artist.*

*Consul's certificate.*

I, Franklin Torrey, counsel of the United States of America at Carrara, do hereby certify that Peter Salada, whose name is subscribed
37 to the foregoing declaration and affirmation, made the same before me this day, in Carrara, is known to me to be a professional sculptor resident in Carrara.

In testimony whereof I have hereunto set my hand and seal of office, at Carrara, this 20th day of December, 1879.

[SEAL.] FRANKLIN TORREY, *Consul.*

38 *Translated from the Italian.*

Depositions of witnesses sworn and examined the 10th day of March, in the year of our Lord 1882, in the town of Carrara (district of Massa & Carrara, Kingdom of Italy), in compliance with powers received from the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of April session, 1880, No. 55.

Giovanni Baratta, charged with the examination of witnesses in a certain cause pending in the said court, wherein Alonzo M. Vité and Francis A. Vité, trading as Vité Brothers, are plaintiffs, and Alexander P. Tutton, collector of the port of Philadelphia, is defendant, having been appointed this 10th day of March, 1882, to take said depositions
39 of interrogatory and cross-interrogatory given by the parties successively, appeared in the hall of the Chamber of Commerce and Arts of Carrara, after having been regularly invited, Signori Pietro, son of late Spiridione Salada, and Carlo Prof. Nicolo, son of Toto, both residing in Carrara.

The said gentlemen having declared they could not speak the English language, has also appeared and was employed by me as interpreter of their depositions Arturo Boccacci, son of late Cesare, residing in Carrara.

Firstly, I then administered to said Sig. Boccacci the following oath:

"You do swear that you will truly & faithfully interpret the oath and interrogatories to be administered to Peter Salada & Prof. Carlo Nicolo,
40 witnesses, now to be examined, from the English language into the Italian language, and that you will truly and faithfully interpret the answers of the said Signori Salada and Nicolo thereto from the Italian language into the English language: so help you God."

And Signor Boccacci, laying his hand and kissing the Gospels, took the said oath, repeating it word by word.

Signor Nicolo having retired, leaving Sig. Salada alone in the room, always with the assistance of and through the interpreter, Signor Boccacci, I informed him of the reason of his appearance; then administered to him the following oath: "You do swear that the answers which shall be given by you to the interrogatories and cross-interrogatories proposed to
41 you shall be the truth, the whole truth, and nothing but the truth; so help you God."

Signor Salada declaring himself to be of the Christian religion, & repeating word by word the said formula, took oath, laying his hand upon and kissing the Gospels.

I further proposed to him the following interrogatories:

To the 1st interrogatory he replied: My name is Pietro Salado, son of the late Speridione, residing in Carrara, am sixty-three years old, sculptor by profession, and proprietor of studio.

To the 2d: I am occupied as a professional sculptor in Carrara, and I have been such for the last 34 years.

42 To the 3rd: It is true that in the year 1879, and, as far as I recollect, in the month of December, I shipped to Vité Brothers, of Philadelphia, on the vessel Santina Ansoldo, three cases containing, the one marked 1076, two boys, and the other two, marked 1074 & 1077, containing an angel sitting in the attitude of writing, and an angel standing in the attitude of praying.

To the 4th: The two boys were taken out and sculptured from antique original models, and the other two were taken out and sculptured from original models made by the sculptor Achille De Cori, a pensioner of the Government at Rome.

To the 5th: I have already said that the author of the original models of the two boys is unknown to me. I know, however, De Cori,

43 who is a professional sculptor, and as such enjoys good reputation, and is known also in Carrara as a professional sculptor. Signor De Cori, as I have already said, won at the Royal Academy of Fine Arts of Carrara the prize of Government pension at Rome.

To the 6th. The original cost of the statues contained in each of the above cases charged by me to Vité Brothers was the following: For the two boys, £300 each, or altogether lire 600; the other two statues or angels to £670 each.

To the 7th: It is true that I shipped in the same year, 1879, on board the Gustav Adolph, to Vité Brothers, of Philadelphia, other cases, three in number, marked 1078, 1079, 1080. The former contained a statue representing Summer, the second another statue representing

44 Autum', the third another statue representing Winter.

To the 8th: The said three statues were taken out and sculptured from three original models, designed and executed expressly by Carlo Nicolo, professor of the Academy of Carrara.

To the 9th: Signor Nicolo, who made the said original models, is a professional sculptor, enjoys the best reputation as such, and is recognized in Carrara as a professional sculptor. He is an honorary professor of the Academy of Fine Arts at Carrara. He also obtained the prize of the Government pension at Rome, and for his professional merits in sculpture was decorated by the Government of Spain.

45 To the 10th: The cost of the statues contained in cases 1078, 1079, 1080, was L. 480 each, as invoiced by me to Viti Bros.

To the 11th: I cannot say precisely, as I do not recollect it.

To the 12th: All the statues contained in the said six cases were executed in my studio in Carrara by Giovanni Padula and Messandro Gemignani, professional sculptors, who, however, worked under my direction.

To the 13th: Both Carlo Nicolo and myself reside in Carrara, and there we executed our professional work.

To the 14th: Signor Nicolo studied sculpture in the Academy

46 of Fine Arts in Carrara, and then in Florence and Rome.

To the 15th: At present Sig. Nicolo is not a pensioner of the Italian

Government, but he was such formerly, and for 3 years, having won the prize of Government pension.

To the 16th: I know that Nicolo habitually and continually executes original figures created of own conception, but, however, he does not carry out his models in marble for want of the necessary time.

To the 17th: I have already said that also the three statues mentioned in the interrogatory No. 7 were executed in my studio in Carrara,
47 and under my direction, by the sculptors Padula and Gemignani, and I repeat that they were executed after models created by the said Nicolo after his own original conception, and not copied from any model nor from photographs or statues of any other sculptor.

To the 18th: The bill of lading shown to me is precisely that of the shipment of the statues by the Gustav Adolph.

To the 19th: Having attentively examined the two documents named in this interrogatory, I recognise that both are signed by me, Pietro Salada, and are those which were sent by me to Viti Brothers. I declared and subscribed such documents before Mr. F. Torrey, at Carrara, as is certified by him with his signature & consular seal.

48 To the 20th: I cannot say anything else than what I have already said.

Having exhausted the interrogatories-in-chief, I propounded to him the cross-interrogatories, to which he answered thus:

To the 1st: With the exception of the two boys, which were copied from an antique original model, the other statues, representing the two angels, and the 3 Seasons, of which I said in the interrogatories-in-chief are original productions, sculptured the first time from original models expressly executed by Signor De Coro and Nicolo.

To the 2d: I must refer to what I have said before.

49 To the 3rd: As regards the two boys I cannot say anything, and for the other 5 statues I declare that those sent to Viti Bros., of Philadelphia, were the first productions.

To the 4th: The profession of the persons who made the statues above mentioned is both to make copies and create original models.

Having thus answered also to the cross-interrogatories, the witness sets here his own signature.

(Signed) PIETRO SALADA.

As also Arturo Boccacci sets his own signature as interpreter.

(Signed) ARTURO BOCCACCI.

50 Examination taken, reduced to writing, and by the witness undersigned and sworn, Pietro Salada, this 10th day of March, before.

P. G. BARATTA,
*Commissioner.*

Being late, the examination of the other witness, C. Nicolo, is remanded to another day.

P. G. BARATTA, *Com'r.*

This 11th day of March, 1882, having been appointed for the examination of Signor Carlo Nicolo, he, after having been duly noticed, has appeared in the hall of the Chamber of Commerce and Arts of Carrara. Signor Boccacci also appeared, always under oath taken, to serve as interpreter to the interrogatories to be propounded to the said Nicolo.

Proceeding then to such interrogatories, I first of all adminis-
51 tered to Signor Nicolo, through the interpreter, the following oath, which he repeated word by word, laying his hand upon and kissing the Gospels:

"You do swear that the answers which shall be given by you to the interrogatories & cross-interrogatories proposed to you shall be the truth, the whole truth, and nothing but the truth, so help you God."

To the 1st interrogatory-in-chief he thus replied: My name is Carlo Nicolo, son of Toto; am 38 years old; my residence is in Carrara, and I exercise the profession of sculpture.

To the 2d: After having accomplished my studies, I began since the year 1871 to exercise the profession of sculptor, and I have exer-
52 cised it habitually in Carrara, my native place, and for some time in Florence, Madrid, and Paris.

To the 3d: I did not ship anything.

To the 4th, 5th, and 6th: I refer to the foregoing.

To the 7th: I have not shipped anything to Vité Brothers, but I know that about that time, viz, at the end of the year 1879, Pietro Salada shipped to Vité Brothers 3 statues, representing the Seasons, the models of which were my own original production.

To the 8th: I repeat that the original models were created by me, and that the statues were executed in the studio of Pietro Salada in Carrara.

53 To the 9th: I have already declared myself to be a professional sculptor, and I cannot answer to the remainder of this interrogatory.

To the 10th: I do not know it.

To the 11th: The models of the 3 Seasons were created & executed by me during the second half year of 1878. Of the other statues I cannot say anything.

To the 12th: I have already said that the Three Seasons, of which I made the model, were executed in the studio of Pietro Salada in Carrara.

To the 13th: Both Pietro Salada and myself reside in Carrara,
54 and there we execute our professional works.

To the 14th: I graduated in the Academy of Fine Arts in Carrara, and afterwards in Florence.

To the 15th: In the year 1867 I won in open competition the prize of 3 years Government pension in the Academy of Fine Arts of Carrara, and then as a pensioner went to Florence to finish my studies. I am now an honorary professor of the Academy of Fine Arts of Carrara, as well as of those of Madrid (Spain) and Urbino (Italy). I obtained several prizes at the artistic exhibitions of Florence, Parma (Italy) and Madrid; and I have been decorated by the Spanish Government.

55 To the 16th: I am not only in the habit of creating models of my own original conception, but I also execute them in marble in my studio, altho' my principal business is that of creating models of original conception.

To the 17th: I have already said that the models of the three statues representing the Seasons were created by me of my first original conception, and were not copied from any design or photograph; and I add that these original models were for the first time sculptured in marble in the studio of Pietro Salada.

To the 18th & 19th: I do not know.

56 To the 20th: I cannot say anything further.

Having exhausted the interrogatories-in-chief, I have put to the witness the cross-interrogatories.

To the 1st he answered: I can only say that the three statues representing the seasons were sculptured in marble for the first time in the studio of Pietro Salada, after models of my own original conception, as it is usually done for sculpturing any statue of first invention.

To the 2d. I refer to what I have said in the foregoing.

To the 3d. As regards the three statues of which I created the models, I have already said that they were executed for the first time in the

57 studio of Pietro Salada, and I am not aware of the same having been executed either there or elsewhere a second time.

To the 4th. I do not know exactly who sculptured in marble the Three Seasons created by me, but I know that a professional sculptor, capable of executing a statue in marble, can also create original works of sculpture.

Being thus finished the examination of the witness, he signed it in his own handwriting.

(Signed) CARLO NICOLO.

Signor A. Boccacci also sets his signature as interpreter.

(Signed) ARTURO BOCCACCI.

58 Examination taken andreduced to writing, and undersigned and sworn to by witness, Carlo Nicolo, this 11th day of March, 1882.

(Signed) G. BARRATTA,
*Commissioner.*

I, Arturo Boccacci, do hereby declare that the foregoing is a true and faithful translation of the original depositions written in the Italian language before the aforesaid commissioner.

ARTURO BOCCACCI.

Per autenticazione.

G. BARRATA,
*Commissioner.*

Fees: Stamped paper, fr. 10.80; writing depositions into Italian, 15; to the interpreter, 60; postages, 3.—fc. 88.80. Commissioner, nihil.

59 (Endorsed:) No. 55. April, 1880. C. C. U. S. E. D. of Pa. Vité et al. vs. Tutton, collector, &c. Commission to Carrara, Italy.

60 And thereupon it is ordered that a jury come to try the issue joined in this cause.

And afterwards, to wit, on the 9th day of October, A. D. 1882, came the parties aforesaid, and the jurors of the jury aforesaid being called, came, to wit:

1. John Goodyear.
2. Lewis S. Heins.
3. J. Henry Worrell.
4. William C. McKnight.
5. Charles B. Roberts.
6. Andrew J. Clower.
7. Solomon Hoover.
8. Joseph H. Palmer.
9. Theodore P. Apple.
10. Charles P. Sinnickson.
11. Asa G. W. Smith.
12. John T. Diebert.

Who are duly empanelled, returned chosen, tried, and sworn or affirmed to speak the truth in the issue joined in this cause.

And afterwards, on the 10th day of October, A. D. 1882, the jurors aforesaid upon their oaths or affirmations aforesaid, respectively do say that they find specially as follows, to wit:

61 1. That during the years 1879 and 1880 the plaintiffs were partners, trading as Viti Brothers, and the defendant was during said time collector of customs for the port of Philadelphia.

2. That between the thirteenth day of November and the twentieth day of December, 1879, the plaintiffs imported into the port of Philadelphia six boxes containing statuary:

One, marked No. 1076, containing statues of two boys.

One, marked No. 1074, containing a statue of an angel sitting in the attitude of writing.

One, marked No. 1077, containing a statue of an angel standing in the attitude of praying.

One, marked No. 1078, containing a statue representing Summer.

One, marked No. 1079, containing a statue representing Autumn.

And another, marked No. 1080, containing a statue representing Winter.

3. That the statues of the two boys were taken out and sculptured from antique original models, and that the author of these models is unknown.

4. That the statues of the two angels were taken out and sculptured from original models made by the sculptor Achille de Cori, a pensioner of the Government at Rome. That he is a professional sculptor, and as such enjoys a good reputation, and is known in Carrara as a professional sculptor, and won at the Royal Academy of Fine Arts of Carrara the prize of a Government pensioner at Rome.

5. That the said three statues representing Summer, Autumn, and Winter were taken out and sculptured from original models designed and executed expressly by Carlo Nicoli, an honorary professor of the Academy of Fine Arts at Carrara; that he studied sculpture in the Academy of Fine Arts there, and afterwards in Florence and Rome; that he enjoys the best reputation as a professional sculptor, and is recognized in Carrara as a professional sculptor; that he obtained the prize of the Government pension at Rome; that for his professional merits in sculpture was decorated by the Government of Spain, and that in open competition he won the prize of three years' Government pension in the Academy of Fine Arts at Carrara, and is also an honorary professor of the Academy of Fine Arts at Madrid, Spain, and Urbine, Italy, and obtained several prizes at the artistic exhibitions of Florence, Parma, and Madrid.

6. That all the said statues contained in the said six cases were executed in the studio of Pietro Salada by Giovanni Padula and Alessandro Gemignani, professional sculptors, under the direction of the said Pietro

62 Salada; that the said Pietro Salada has been a professional sculptor in Carrara for the last thirty-four years.

7. That with the exception of the two boys, which were executed from antique originals, the other statues were sculptured for the first time from the originals expressly executed by the said De Cori and Nicoli, and were the first productions from the said models.

8. That the costs of the statues of the two boys was 300 lire each, or 600 lire; and of the two angels 690 lire each; and of the three seasons 480 lire each.

9. That defendant, as said collector, exacted from said plaintiffs thereon duties as follows: Fifty per cent. ad valorem, which duties were paid by the plaintiffs on the 30th of March, 1880.

10. That on February 8 and February 9, 1880, the plaintiffs made due protest against the exaction of said duties, claiming that said marble statuary was dutiable at ten per cent. ad valorem.

11. That plaintiffs made due appeal to the Secretary of the Treasury from said decision of said collector, who, on March 18, 1880, affirmed the said decision of said defendant; whereupon, on the 15th day of June, 1880, plaintiffs brought this suit.

12. That the amount exacted by the said defendant over and above the amount claimed to be due by the said plaintiffs on the statues of the two boys was..... $43 60
On the statues of the two angels..... 97 60
And on the statues of the Three Seasons..... 101 20

In all, amounting to the sum of..... $242 40

And the said jurors say that they are ignorant in point of law on which side they ought upon the facts to find the issue, but that if the court should be of opinion that the plaintiffs are entitled to recover the money paid as duties on the statues of the two boys above the amount claimed to be due by the said plaintiffs, then they find for said plaintiffs in the sum of $43.60, with interest thereon from March 30, 1880.

That if the court should be of opinion that the plaintiffs are entitled to recover the money paid as duties on the two statues representing two angels above the amount claimed to be due by the said plaintiffs, then they find for the said plaintiffs in the further sum of $97.60, with interest thereon from March 30, 1880.

That if the court should be of opinion that the plaintiffs are entitled to recover the money paid as duties on the three statues representing the Seasons above the amount claimed to be due by the said plaintiffs, then they find for the said plaintiffs in the further sum of $101.20, with interest thereon from March 30, 1880.

That if the court should be of the opinion that the plaintiffs are entitled to recover the money paid as duties on all the aforesaid statues above the amount claimed to be due by the said plaintiffs, then they find for the said plaintiffs in the sum of $242.40, with interest thereon from March 30, 1880.

63 And afterwards, to wit, on the 23rd day of October, A. D. 1882, this cause coming on to be heard on special verdict, and being argued by counsel for the respective parties, the same is held under advisement by the court.

And afterwards, to wit, on the 24th day of October, the court, by Hon. William McKennan, circuit judge, filed the following opinion, to wit:

64 In the circuit court, east. dist. of Penn'a.

VITI BROTHERS
*vs.*
TUTTON, COLLECTOR.

Before McKennan, Cir. J., and Butler, J.

McKENNAN, *Cir. J.:*

This suit was brought to recover back alleged excessive duties exacted upon the importation of a number of pieces of statuary. A special verdict has been found, which presents the single question whether the duty imposed and paid is authorized by law.

This question is to be answered by determining the meaning of sec. 2504, Schedule M, of the Revised Statutes, which is as follows: "Paintings and statuary, not otherwise provided for, ten per centum ad valorem. But the term statuary, as used in the laws now in force imposing duties on foreign importations, shall be understood to include professional productions of a statuary or sculptor only."

The object of the act is doubtless to encourage a taste for art, and hence to admit the work of professional artists at a low rate of duty.

The plain meaning, then, of the words of the section would seem to be that dutiable statuary shall include all the artistic work of a professional statuary or sculptor produced in the exercise of his profession.

But it is urged that only the artist who conceived the ideal of the corporealized image is entitled to the benefit of the low duty, and hence that the statuary or sculptor who has modelled the work which he or others have finished is alone within the category of the section.

We cannot accept this construction of the section, because it involves an arbitrary restriction of the common and well-understood meaning of its words.

A sculptor is "one whose occupation is to carve wood, stone, or other material into images or statues."

A statuary is "one who professes or practices the art of carving images or making statues."

The "professional productions" of a statuary or sculptor are the practical results of the practice of his profession or occupation; in other words, they are "images or statues" produced by the exercise of his professional skill.

In this sense of the words of the statute it clearly embraces all the artistic work of a statuary or sculptor who pursues the employment of his class as a profession. We cannot otherwise construe them without wrenching them from their generally accepted signification. We cannot adopt metaphysical or speculative definitions of them which have this effect, nor can we change the meaning of the statute by injecting into it a word or words which the legislature has thought proper to omit, and which is obviously necessary to authorize the construction contended for by the defendant.

All the statues described in the special verdict, except those of the two boys, are confessedly comprehended by either of the contested constructions of the statute, and are therefore subject to a duty of only ten per cent. ad valorem.

The two boys were executed from antique models, but they were the product of the labor and skill of professional sculptors, and hence were their "professional productions" within the purview of the law, and are subject to the same rate of duty with the others.

Judgment is therefore directed to be entered on the special verdict in favor of the plaintiffs for $242.40, with interest from March 30, 1880.

Whereupon judgment is entered in favor of the plaintiffs and against the defendant.

65 *Bill of exceptions.*

Be it remembered that in the session of April, A. D. 1880, came Alonzo M. Viti and Francis A. Viti, trading as Viti Brothers, plaintiffs, into the circuit court of the United States for the eastern district of Pennsylvania, and impleaded Alexander P. Tutton, collector of customs of the port of Philadelphia, defendant, in a certain plea of trespass on the case, &c., in which the said plaintiffs declared (prout narr) and the said defendant pleaded (prout pleas), and thereupon issue was joined between them.

And afterwards, to wit, at a session of said court held at the , before the honorable William McKennan and William Butler, judges of the said court, on Monday, the ninth day of October, A. D. 1882, the aforesaid issue between the said parties came to be tried by a jury of the said district, for that purpose duly impannelled (prout list of jurors), at which day came as well the said plaintiffs as the said defendant, by their respective attorneys, and the jurors of the jury aforesaid impannelled to try the

66 said issues, being also called, came and were then and there in due manner chosen and sworn or affirmed to try the said issue; and upon the trial the jury found—

67 1. That during the years 1879 and 1880 the plaintiffs were partners, trading as Viti Brothers, and the defendant was during said time collector of customs for the port of Philadelphia.

2. That between the thirteenth day of November and the twentieth day of December, 1879, the plaintiffs imported into the port of Philadelphia six boxes containing statuary:

One marked No. 1076, containing statues of two boys.

One marked No. 1074, containing a statue of an angel sitting in the attitude of writing.

One marked No. 1077, containing a statue of an angel standing in the attitude of praying.

One marked No. 1078, containing a statue representing Summer.

One marked No. 1079, containing a statue representing Autumn.

And another marked No. 1080, containing a statue representing Winter.

3. That the statues of the two boys were taken out and sculptured from antique original models, and that the author of these models is unknown.

4. That the statues of the two angels were taken out and sculptured from original models made by the sculptor Achille De Cori, a pensioner of the Government at Rome; that he is a professional sculptor, and as such enjoys a good reputation, and is known in Carrara as a professional sculptor, and won at the Royal Academy of Fine Arts of Carrara the prize of a Government pensioner at Rome.

5. That the said three statues representing Summer, Autumn, and Winter were taken out and sculptured from original models designed and executed expressly by Carlo Nicoli, an honorary professor of the Academy of Fine Arts at Carrara; that he studied sculpture in the Academy of Fine Arts there, and afterwards in Florence and Rome; that he enjoys the best reputation as a professional sculptor, and is recognized in Carrara as a professional sculptor; that he obtained the prize of the Government pension at Rome; that for his professional merits in sculpture was decorated by the Government of Spain, and that in open competition he won the prize of three years' Government pension in the Academy of Fine Arts at Carrara, and is also an honorary professor of the Academy of Fine Arts at Madrid, Spain, and Urbine, Italy, and obtained several prizes at the artistic exhibitions of Florence, Parma, and Madrid.

6. That all the said statues contained in the said six cases were executed in the studio of Pietro Salada by Giovanni Padula and Alessandro Gemignani, professional sculptors, under the direction of the said Pietro
68 Salada; that the said Pietro Salada has been a professional sculptor in Carrara for the last thirty-four years.

7. That with the exception of the two boys, which were executed from antique originals, the other statues were sculptured for the first time from the originals expressly executed by the said De Cori and Nicoli, and were the first productions from the said models.

8. That the costs of the statues of the two boys was 300 lire each, or 600 lire; and of the two angels 690 lire each; and of the Three Seasons 480 lire each.

9. That defendant, as said collector, exacted from said plaintiffs thereon duties as follows: Fifty per cent. ad valorem, which duties were paid by the plaintiffs on the 30th of March, 1880.

10. That on February 8 and February 9, 1880, the plaintiffs made due protest against the exaction of said duties, claiming that said marble statuary was dutiable at ten per cent. ad valorem.

11. That plaintiffs made due appeal to the Secretary of the Treasury from said decision of said collector, who, on March 18, 1880, affirmed the said decision of said defendant; whereupon, on the 15th day of June, 1880, plaintiffs brought this suit.

12. That the amount exacted by the said defendant over and above the amount claimed to be due by the said plaintiffs on the statues of the two boys was..... $43 60
On the statues of the two angels..... 97 60
And on the statues of the Three Seasons..... 101 20

In all, amounting to the sum of..... $242 40

69 And the said jurors say that they are ignorant in point of law on which side they ought upon the facts to find the issue, but that if the court should be of opinion that the plaintiffs are entitled to recover the money paid as duties on the statues of the two boys above the amount claimed to be due by the said plaintiffs, then they find for said plaintiffs in the sum of $43.60, with interest thereon from March 30, 1880.

That if the court should be of opinion that the plaintiffs are entitled to recover the money paid as duties on the two statues representing two angels above the amount claimed to be due by the said plaintiffs, then

they find for the said plaintiffs in the further sum of $97.60, with interest thereon from March 30, 1880.

That if the court should be of opinion that the plaintiffs are entitled to recover the money paid as duties on the three statues representing the Seasons above the amount claimed to be due by the said plaintiffs, then they find for the said plaintiffs in the further sum of $101.20, with interest thereon from March 30, 1880.

That if the court should be of the opinion that the plaintiffs are entitled to recover the money paid as duties on all the aforesaid statues above the amount claimed to be due by the said plaintiffs, then they find for the said plaintiffs in the sum of $242.40, with interest thereon from March 30, 1880.

70 And afterwards, to wit, on the 24th day of October, 1882, the said William McKennan, judge as aforesaid, entered judgment for the plaintiffs aforesaid, upon the verdict, for the sum of two hundred and forty-two dollars and forty cents ($242.40).

And thereupon the counsel for the said defendant did then and there except to the aforesaid judgment and opinion of the said court, and inasmuch as the said charge and opinion so excepted to do not appear upon the record the said counsel for the said defendant did then and there tender this bill of exceptions to the said judgment, charge, and opinion of the said court, and requested the seal of the judge aforesaid should be put to the same according to the form of the statute in such case made and provided. And thereupon the aforesaid judge, at the request of the said counsel for the defendant, did put his seal to this bill of exceptions, pursuant to

71 the aforesaid statute in such case made and provided, this eighth day of December, A. D. 1882.

[SEAL.] WM. BUTLER, *Judge*.

(Endorsed:) No. 55. April sess., 1880. Circuit court United States, eastern district of Penn'a. Alonzo M. Viti and Francis A. Viti trading as Viti Brothers, vs. Alexander P. Tutton, collector, &c. Bill of exceptions. Filed December 13, 1882. John K. Valentine, attorney for def't.

72 UNITED STATES OF AMERICA,
*Eastern District of Pennsylvania, set.:*

I, Samuel Bell, clerk of the circuit court of the United States of America for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original record and proceedings in the case of Alonzo M. Vité and Francis A. Vité, trading as Vité Brothers, vs. Alexander P. Tutton, collector of customs for the district of Philadelphia, No. 55, April sess., 1880, on file, and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this tenth day of January, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of these United States the one hundred and seventh.

[SEAL.] SAMUEL BELL,
*Clerk of C. C.*

73 ALEXANDER P. TUTTON, COLLECTOR OF customs for the district of Philadelphia, plaintiff in error,
*vs.*
ALONZO M. VITÉ AND FRANCIS A. VITÉ, TRADING as Vité Brothers, defendants in error.

And now, , before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said plaintiff in error, to wit, the said Alexander P. Tutton, by John K. Valentine, esquire, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the said record it appears that the judgment aforesaid given was given for the defendants aforesaid, upon the special verdict aforesaid, found as aforesaid by the jury in said suit, and against the said plaintiff, whereas by the law of the land the said judgment ought to have been given for said plaintiff upon said special verdict and against the said defendants; and the said plaintiff prays that the said judgment may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he has lost by occasion of the said judgment.

JOHN K. VALENTINE,
*Attorney for Plaintiff in Error.*

(Indorsed:) 51791–80*f*. Alexander P. Tutton, collector of customs for the district of Philadelphia, plaintiff in error, vs. Alonzo M. Vité and Francis A. Vité, trading as Vité Brothers, defendants in error. Assignment of error. 10311, 3, 37. Jno. K. Valentine, att'y for pl'ff in error.

(Indorsement on cover:) No. 1206. Alexander P. Tutton, collector of customs for the port of Philadelphia, plaintiff in error, vs. Alonzo M. Vité & Francis A. Vité, trading as Vité Brothers. E. Pennsylvania C. C. U. S. Filed 31 January, 1883.

108-812

SUPREME COURT U.S.
FILED
MAR 31 1883
A. McKENNEY, Clerk.

# In the Supreme Court of the United States.

OCTOBER TERM, 1882.

TUTTON, COLLECTOR,
*v.*
VITI BROTHERS.
No. 1206.

## BRIEF FOR THE COLLECTOR.

# In the Supreme Court of the United States.

OCTOBER TERM, 1882.

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TUTTON, COLLECTOR,
*v.*
VITI BROTHERS.
No. 1206.

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## BRIEF FOR THE COLLECTOR.

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This was a suit brought against the collector to recover duties exacted from importers of *statuary*.

A special verdict was found below, and this appears upon pages 17 and 18 of the record, and is followed there by the opinion of the learned judge, and by a bill of exceptions for the collector.

For error is assigned the judgment given upon such verdict in favor of the importers.

I have been favored with a copy of the brief of the learned counsel for the Government in the court below. As nothing occurs to me to say in addition to what appears upon that brief, I reproduce and adopt it here.

I may add that the definition of the word *statuary* in section 2504 (below) has been exactly reproduced in the tariff provisions of the late act, approved March 3, 1883. See sched. N, therein, paragraph beginning "Paintings, in oil or water colors," &c.

S. F. PHILLIPS,
*Solicitor-General.*

The question, under the special verdict, arises under the following provisions of the Revised Statutes, section 2504, schedule M, page 478, R. St. "Paintings and statuary, not otherwise provided for, 10 per centum *ad valorem*. But the term statuary, as used in the laws now in force, imposing duties on foreign importations, shall be understood to include professional productions of a statuary or of a sculptor only.

"All manufactures of marble, not otherwise provided for, 50 per centum *ad valorem*."

The special verdict presents two questions:

*First.* Whether the statues of the two boys are subject to a duty of 10 or of 50 per centum.

*Second.* The same question as to the other five stautes

The question is clearly presented in the case of the statues of the two boys, whether statues manufactured in indefinite numbers from antique models are within that provision of the law which requires that such work shall be the "professional productions of a statuary or sculptor only," and therefore subject to a duty of 10 per centum.

It is obvious that the law did not intend, under this provision as to painting and statuary, to include *all statuary*. What was intended to be included? The law is explicit. "*The professional productions of a statuary or of a sculptor only.*"

There are two limitations. First, they must be "*professional* productions." Second, they must be the professional productions of a *statuary or sculptor*.

The history of the legislation on this subject throws light on the meaning of the law as it stands at present. By the

act of March 3, 1857, 11 St., 194, sec. 3, schedule I, "paintings and statuary" were included in the free list.

By the act of March 2, 1861, 12 St., 195, sec. 23, "Paintings and statuary, the productions of American artists residing abroad: *Provided*, The same be imported in good faith as objects of taste and not of merchandise," were exempt from duty.

By section 19 of the same act, 12 St., 188, "Paintings and statuary, not otherwise provided for," were subject to a duty of 10 per centum.

By the act of July 14, 1862, section 19, 12 St., 559, the 23d section of the act of March 2, 1861, was amended as follows: By striking out "*Provided*, The same be imported in good faith as objects of taste and not of merchandise," and inserting "*Provided*, The fact as aforesaid shall be certified by the artist or by a consul of the United States."

Then followed the act of the 3d of March, 1865, in which the words of limitation were introduced, and a restricted meaning was given to the word "statuary" for the first time. Section 5th of that act, 13 St., 493, is in these words: "*And be it further enacted*, That the term statuary, as used in the law now in force imposing duties on foreign importations, shall be understood to include professional productions of a statuary or of a sculptor only."

It is thus apparent from this legislation that the introduction of the clause defining the word statuary was intended to restrict its meaning. After the act of 1865 it was not *all* statuary that was to be understood when the term *statuary* was used in the acts as they then stood, but

statuary of a limited kind, viz, the professional productions of a statuary or sculptor only.

Now, if this language did not mean the original productions of a statuary or sculptor only, it is hard to understand the purpose of the act. Some distinction was intended to be made, and what other distinction is possible than that which is commonly understood to exist between originals and copies? If the act did not mean this it appears to be without any effect.

While the history of the law seems to make its purpose clear, the words used also plainly indicate its meaning.

What is a professional production? The theory of the plaintiff is that all works of a professional sculptor are professional productions. He seems to consider the question abstractly, without regard to the special provisions and limitations of the law.

The work of the sculptor requires skill as a mechanic or artisan, but this skill as a mere mechanic or artisan may be possessed by a person who is not a professional sculptor. All men who paint are painters; all men who sculpture marble are sculptors; but all painters are not *professional* painters, and all sculptors are not *professional* sculptors. The mere mechanical part of the work of the sculptor is not the important part of his professional work. The mechanical work may be done by the professional sculptor, or it may be done by the mechanic or artisan, and the fact that it is done by the professional sculptor does not alter the character of the work. The work is not a *professional production merely because it is done* by a professional sculptor. If the mechanic or the artisan, without reputation as a sculptor, were to make a model

from his own conception, he would in this be doing the work which belongs especially to the professional sculptor. If the professional sculptor makes the statue from the model, he is only doing the work of the mechanic or artisan. The concepcion of the figure is the highest work of the artist or professional sculptor. The execution of the statue is the work of the mechanic or artisan. While in a general sense every work of art executed by a person skilled as a sculptor might be called a *professional production*, the law makes a limitation. It is the conception of the figure that is implied in *production*, without this conception there is neither in law nor in the true professional sense a *production*.

A copy of any work could not be called an original, nor would the copy of a work, however perfect, be spoken of as the *production* of the original artist. A copy of Canova's group of Love and Psyche, executed by a professional sculptor, however celebrated, would not be called the *production* of Canova, much less could it be called *the professional production* of Canova.

The fact that copies of statues were multiplied indefinitely was well known. That these were of less value than the originals, both in a professional and mercantile sense, was also well known. The law discriminated only where the discrimination had been made by the public. It was intended to admit originals which were the creation of the author, and in the proper sense his professional productions, at a lower rate of duty than copies which were not his productions.

The fact that copies of paintings pay the same rate of duty as the originals is in accordance with the express pro-

visions of the law. There is no limitation as to paintings. If there had been no limitation as to statues, copies of statues would also have paid the same rate of duty as the originals. It is the express provision that makes the distinction, and this distinction is necessary to give the words of the statute effect. Otherwise these words of limitation would have no application. *All* statues would be admitted under this section just as *all* paintings are to be admitted.

Exceptional cases of duplication, by the author himself, where both works may in some sense be considered originals, prove nothing. These exceptions do not affect the question of *copies* as generally understood by the public or the profession, nor do they affect the legal question involved in this case. The question here is not that of a duplication by the author himself, nor is it the supposed case of a "*reproduction*" of the statue of Venus de Medici, by Powers. It is the case of manufacture of statues from the same models in quantities to suit purchasers, not by the author who produced the models, but by a firm or by persons engaged in that business.

It is claimed that under the treaty between the United States and Italy that Italian artists are entitled to import their productions free of duty, because Italian citizens are to enjoy under this treaty the same favors and immunities and exemptions for their commerce and navigation as citizens of the United States.

This question is not presented in this case. It is not stated that the plaintiffs are Italian citizens claiming exemption under the treaty.

The court, however, cannot, in the interpretation of a

statute, consider the fact of whether or not the statute is a violation of the treaty. This is a question for the executive, not for the judicial branch of the Government.

The words "statuary or sculptor" are used as synonymous in the law, and their meaning is fully discussed in the decisions of the Treasury Department hereto annexed.

JOHN K. VALENTINE,
*Attorney for Defendant.*

## DECISIONS OF THE TREASURY DEPARTMENT.

Under date of October 27, 1879, the Treasury Department decided as follows. Synopsis of decision 4266:

"The term statuary, as used in the law, has a twofold meaning: First, the finished production of a sulptor or statuary; and, second, the person who professes to practice the art of sculpturing.

"Webster defines a statuary, in the sense last above used, as one who professes or practices the art of carving images or making statues.

"He defines a sculptor to be 'one who sculptures; one whose occupation is to carve images or figures.' The words under this definition are nearly, if not quite, synonymous.

"In a note to a decision (3942) of March 31, 1879, the Department has defined what articles shall be admitted as the work of an artist under the provision which admits the productions of American artists free of duty. It is there held that a statue in bronze or marble may be the work of an artist, although the identical figure imported may have been cast or carved entirely by other hands than his own, if the model from which the figure was cut or cast was the creation of the artist. The distinction between an artist and an artisan is given by Webster as follows: 'An artist is one who is skilled in some one of the fine arts; an artisan is one who exercises any mechanical employment. A portrait painter is an artist; a sign painter is an artisan.' Something of this direction must be inferred from the lan-

guage of the provision for statuary before referred to. If Congress had intended to admit all statuary under the provision for statuary, whether the work of an artist or a mere artisan, the word statuary would have been sufficient. It, however, evidently intended a limitation of this general sense when it declared that the term 'statuary,' as used in the laws, shall be understood to include the professional productions of a statuary or of a sculptor only. The key to the intended limitation seems to be found in the word 'professional.' The distinction between a profession and a trade, or mere occupation, is well understood in the common use of language. One of the definitions of the word profession, as given by Webster, is the 'occupation—if not mechanical, agricultural, or the like—to which one devotes himself.' In both the common and the critical use of language the word profession implies a higher order of employment than that of a mechanic or artisan, and it is difficult to attach any meaning whatever to the restrictive clause of the statute, unless it be that the term statuary shall include only the productions of artists, as distinguished from mechanics or artisans. This view is fortified by the manifest intention of Congress in other provisions of the tariff laws adopted to encourage works of art, as, for instance, in the provision for the free admission of articles imported for the use of any institution established for the encouragement of the fine arts.

"Also, in the provision for the free admission of works of art imported for presentation to national institutions, or to any State or municipal corporation.

"Also, in the provision that paintings and statuary imported for exhibition by any association for the promotion

of science, art, and industry may be admitted free, to be exported within six months, under sec. 2512 of the Revised Statutes.

"Also, the provision that paintings, statuary, and other works of art, the production of American artists, may be admitted free of duty.

"In the view of the subject thus presented, the quality of the material, whether veined or statuary marble or sandstone or granite, is immaterial; nor, indeed, can the artistic merit of the particular statue in question be the criterion for classification. If it be the production of a professional statuary or sculptor in the sense above defined, it is statuary within the intent of the law. On the other hand, if it be but a mere mechanical copy, however perfect, of Phidias or Praxiteles or other ancient artists, it is not the professional production of a statuary or sculptor, but is to be regarded as a manufacture of marble, subject to a duty of 50 per cent. *ad valorem*. Invoices of statuary from foreign countries, to be admitted at a duty of 10 per cent. *ad valorem*, therefore, must be accompanied by a certificate from the artist, declared to before a consular officer of the United States, showing that the former is a professional sculptor or statuary, wherever practicable."

Under date of February 6, 1880, Synopsis of Decision 4416, the Treasury Department states that "the consuls discuss the subject in the light of the decision of this Department of the 27th of October, 1879, which had for its object a definition of the word 'statuary' as used in the law, which declares that that term shall be held to include only the professional production of a statuary or of a sculptor.

"A distinction was therein made between figures which were the work of mere artisans and those produced by artists; and to admit figures which were the productions of professional artists, it was held necessary that a certificate from the artist, declared to before a consular officer of the United States, should accompany the invoice. From the report of the consul at Carrara, it appears that large numbers of persons are engaged in business at Carrara, manufacturing cemetery figures representing Hope, Faith, Gratitude, Sailor Boy, and other like productions, which are made by workmen under their control, and that they turn out duplicates of these figures in any desired quantity, and that they are held for sale accordingly. The consul at Carrara designates this character of work as 'slop work,' a term aptly descriptive of it, viewed from an artistic sense. It evidently was not the design of Congress, when enacting that statuary, the professional production of a sculptor or statuary, should be admitted at a duty of 10 per cent., to favor the importation at that rate of duty of this class of merchandise.

"The terms professional productions of a sculptor and productions of a professional sculptor are considered as having the same signification, and the articles must be the productions of a professional sculptor or statuary in the true definition of that term in order to be admissible at a duty of 10 per cent. Professional artists are understood generally to execute figures to the best of their ability, either upon an order given for a special production, or according to their own conception, wrought out after months of patient labor. This Department therefore holds that the class of work specially alluded to by the consul at

Carrara, and before described, is not the production of a professional sculptor, and that consular officers should refuse to give the certificate required by the decision of October 27, 1879, in such cases. The consul at Rome, referring to the character of marble figures largely shipped from Carrara to this country, states that they are made by men who call themselves professional sculptors, but that they are not real works of art, and are, in fact, nothing but manufactures of marble made by good artisans. The following is an extract from his dispatch, further in pursuance of the subject:

"'From an artistic point of view—and it seems to me that this would also meet the needs of the revenue in part—I should be disposed to consider as marble manufactures, and not as works of art as meant by the law, all works coming from a business house, whether a single individual or a firm, and especially the latter, and not from the studio of a single sculptor. It would be for business purposes, for the purpose of manufacture, and not for art, that several sculptors would combine into one firm or establishment. Such a business house could readily be distinguished by its sign, by its clerks, by the printed headings of its bills, and by the knowledge of its business which, with a little patience, could readily be gained by the consul.'

"These views correspond with those entertained by this Department, and consular officers generally, when considering the subject of granting certificates under the circular of June 10, 1879, should act in accordance with the general views herein expressed."

108-312

SUPREME COURT U.S.
FILED
APR 5 1883
JAMES H. McKENNEY, Clerk.

IN THE

# Supreme Court of the United States.

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ALEXANDER P. TUTTON, Collector of the Port of Philadelphia,

*vs.*

ALONZO M. VITI AND FRANCIS A. VITI, trading as VITI BROTHERS.

October Term, 1882.

No. 1206.

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## Argument of Defendant in Error.

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EDWARD SHIPPEN,
*Attorney for Defendant in Error.*

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1882. No. 1206.

ALEXANDER P. TUTTON, Collector of the Port of Philadelphia,

*vs.*

ALONZO M. VITI AND FRANCIS A. VITI, TRADING AS VITI BROTHERS.

ARGUMENT FOR DEFENDANTS IN ERROR UPON THE QUESTIONS OF LAW ARISING UNDER THE FOLLOWING SPECIAL VERDICT:—

SPECIAL VERDICT.

The jury find:

That, during the years 1879 and 1880, the plaintiffs were partners, trading as Viti Brothers, and the defendant was, during said time, Collector of Customs for the port of Philadelphia.

That between the thirteenth day of November and the twentieth day of December, A. D. 1879, the plaintiffs imported into the port of Philadelphia six boxes containing statuary:

One marked No. 1076, containing statues, two boys.

One marked No. 1074, containing an angel sitting in the attitude of writing.

One marked No. 1077, containing an angel standing in the attitude of praying.

One marked No. 1078, contained a statue representing Summer.

One marked No. 1079, contained a statue representing Autumn.

One marked No. 1080, contained a statue representing Winter.

3. That the statues of the two boys were taken out and sculptured from antique original models, and that the author of those models is unknown.

4. That the statues of the two angels were taken out and sculptured from original models made by the sculptor, Achille de Cori, a pensioner of the government at Rome. That he is a professional sculptor, and as such enjoys a good reputation, and is known in Carrara as a professional sculptor, and won at the Royal Academy of Fine Arts of Carrara, the prize of a government pension at Rome.

5. That the said three statues, representing Summer, Autumn, and Winter, were taken out and sculptured from original models designed and executed by Carlo Nicoli, an honorary member of the Academy of Fine Arts at Carrara. That he studied sculpture in the Academy of Fine Arts there, and then in Florence and Rome; that he enjoys the best reputation as a professional sculptor, and is recognized in Carrara as a professional sculptor; that he obtained the prize of the government pension at Rome; that for his professional merits in sculpture he was decorated by the government of Spain, and that in open competition he won the prize of three years' government pension in the Academy of Fine Arts at Carrara, and is also an honorary member of the Academy of Fine Arts at Madrid, Spain, and Urbino, Italy, and obtained several prizes at the Artistic Exhibitions of Florence, Parma, and Madrid.

6. That all the said statues contained in the said six cases were executed in the studio of Pietro Salada, by

Giovani Padula and Alessandre Gemignani, professional sculptors, under the direction of the said Pietro Salada, and that the said Pietro Salada has been a professional sculptor in Carrara for the last thirty-four years.

7. That with the exception of the "Two Boys," which were executed from antique originals, the other statues were sculptured for the first time from the originals expressly executed by the said De Cori and Nicoli, and were the first productions from said models.

8. That the cost of the "Two Boys" was three hundred lire each, or six hundred lire; and of the two angels, six hundred and ninety lire each; and of the three seasons, four hundred and eighty lire each.

9. That defendant, as said collector, exacted from said plaintiffs, thereon duties as follows: Fifty per cent. *ad valorem*, which duties were paid by the plaintffs on the dates mentioned in the bill of particulars, to wit: March 24, 1880.

10. That on February 8th and February 9th, 1880, the plaintiffs made due protest against the exaction of said duties, claiming that said marble statuary was dutiable at ten per cent. *ad valorem*.

11. That plaintiffs made due appeal to the Secretary of the Treasury from said decision of said collector, who, on March 18, 1880, affirmed the said decision of the said defendant, whereupon, within ninety days thereafter, plaintiffs brought this suit.

12. That the amount exacted by the said defendant, over and above the amount claimed to be due by the plaintiffs on the boys, was . . . . . $43.60
On the two angels, . . . . . 97.60
And on the three seasons, . . . . 101.20

In all amounting to the sum of $242 40

And the said jurors say that they are ignorant, in point of law, on which side they ought, upon the facts, to find the

issue, but that if the court should be of opinion that the plaintiffs are entitled to recover the money paid as duties on the statues of the two boys, above the amount claimed to be due by the said plaintiffs, then they find for said plaintiffs in the sum of $43.60, with interest thereon.

That if the court should be of opinion that the plaintiffs are entitled to recover the money paid as duties on the two statues, representing two angels, above the amount claimed to be due by the said plaintiffs, then they find for the said plaintiffs in the further sum of $97.60, with interest thereon from March 30, 1880.

That if the court should be of opinion that the plaintiffs are entitled to recover the money paid as duties on the three statues, representing the seasons, above the amount claimed to be due by the said plaintiffs, then they find for the said plaintiffs in the further sum of $101.20, with interest from March 30, 1880.

That if the court should be of the opinion that the plaintiffs are entitled to recover the moneys paid as duties on all the aforsaid statues, above the amount claimed to be due by the said plaintiffs, then they find for the said plaintiffs in the sum of $242.40, with interest thereon from March 30, 1880.

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## ARGUMENT.

The facts found by the said special verdict of the jury, present two questions for the determination of this court. Briefly stated they are:

*First.*—Whether the duties exacted under the decision of the Treasury Department upon the statuary named, namely, the "Two Boys," fifty per cent. is in accordance with law, or whether they should be ten per cent., as claimed by the defendant in error.

*Second.*—The same question presents itself with respect to the other five pieces of statuary; and

The facts in relation to both are nearly similar, and are thus stated:

All the six pieces were executed in the studio of Pietro Salada at Carrara, by Alessandre Gemignani and Geovani Padula, two professional sculptors, and all of them were executed under the direction of Pietro Salada.

The Two Boys were thus sculptured from antiques whose author is unknown. Two others, the Angels, were also thus sculptured from original models made by Achille de Cori, and the Three Seasons were sculptured from original models by Carlo Niccoli. Pietro Salada is a professional sculptor at Carrara, and has been so for thirty-five years.

Achille de Cori is a professional sculptor who enjoys a good reputation, is well known, is a pensioner of the government at Rome, and won at the Royal Academy of Fine Arts the prize for superior skill.

Carlo Niccoli is also a professional sculptor, an honorary member of the Academy of Fine Arts at Carrara, studied sculpture at said academy, and in Rome, and at Florence. He enjoys the best reputation as a professional sculptor, and obtained the first prize of government pension at Rome in open competition. He is also honorary professor of the academies of fine arts at Carrara, Madrid and Urbino, and obtained several prizes at the artistic exhibitions at Florence, Parma and Madrid, and for his professional skill was decorated by the government of Spain.

Thus it appears by the findings of the jury that all persons in any wise concerned in the modeling or sculpturing of said statuary were, in the fullest sense of the word, professional sculptors.

Besides, all of the said sculptures, except the "Two Boys," were executed from *original* models, and they were also the *first* productions, while the "Two Boys" were sculptured from antiques, and by the professional sculptors, Padula and Gemignani.

Are they entitled to be entered at ten per cent., or fifty per cent. *ad valorem?*

The Acts of Congress, regulating the duties on sculpture, provide :

"Paintings and statuary not otherwise provided for, ten per centum *ad valorem;* but the term 'statuary,' as used in laws now in force, imposing duties on foreign importations shall be understood to include professional productions of a statuary or sculptor only. All manufacturers of marble not otherwise provided for, fifty per centum *ad valorem.*"—(*Schedule M, Revised Statutes.*)

It may be well here to inquire what is the professional production of a sculptor—who is a statuary, and who a sculptor?

*Worcester* defines a statuary to be—

> "An artist who makes statues, generally understood to "be *after* the designs of some other artist to whom the "word sculptor properly applies."

According to *Webster*—

> "One who professes or practices the art of carving "images or making statues."

*Imperial Lexicon*—

> "One who professes or practices the art of carving "images or making statues. Also the art of carving "images as representatives of real persons or things."

*Worcester*—

> A sculptor:—"An artist who carves or cuts with the "chisel images or statues of wood, stone or metal "(*Dryden*); and, one whose occupation is to carve "wood, stone, or other material, into images."

*Imperial Lexington*—

> Sculpture:—"The art of carving, cutting, or hewing in "wood, stone or other material into images of men, "beasts or other things. The origin of sculpture is so "remote that all attempts to trace it have been fruit- "less. Sculpture is a generic term including carving a "statuary or engraving. Sculpture also includes *mould-* "*ing* of casts into clay and founding of brazen or bronze "statues."

*Again from Worcester:*

1st.—"Sculpture, the art of carving, chiseling in wood, "stone, or other material, or of forming images or "statues of visible objects from solid substances. "The term sculpture has been applied to carving, "*modeling* or other plastic art; to casting in metals, and "to gem engravings; but it is usually applied to the "art of forming images in stone."—(*Tomlinson.*) 2d. "The *works* of sculpture, carved images or statues; "carved work."

*Chambers' Encyclopædia.*

Sculpture:—"The process of graving or cutting hard "material. Its common application is to *artistic* cutting. "Again, sculpture is the art of expressing ideas or "images in solid material. In this some processes, which "do not, strictly speaking, involve the cutting of hard "substances, are not included in the term. Again, "sculpture as an *art* includes the moulding of soft "material, as clay, and has been in all ages of the *art* "employed sometimes for studies, or models for repro- "duction in marble. Whether the more celebrated "sculptors of ancient times cut their designs at once "without previous rehearsal of a model we do not know. "It is, however, very probable."

Michael Angelo, the most powerful of modern sculptors, is known to have worked many of his statues, without any model, out of the block direct.

We know that he cut the solid block from mother earth, fenced it in, kept it from mortal eye, until he chiseled out the work to completion. His biographer adds, "How he chiseled away, confident of his own good eye." It was not his universal practice to consign the stone, as is the case in the present age of the art, to other hands until, ready for the finish, but from the first touch to the last he did, at times, the whole work himself.

There remains now at Florence and in the Louvre marble sketches, or unfinished figures, roughed out until one-eighth of an inch of the final finish. The length and size of the marks of the chisel show how bravely this master went to work.

In ancient statues we find the most striking proof of the freedom and boldness that accompanied each stroke of the chisel, which resulted from the artist being perfectly sure of the accuracy of his idea, and of the precision and steadiness of the touch.

The most minute parts of a figure carry these marks of assurance and freedom; no indication of timorousness or diffidence appears; nothing that can induce us to fancy the artist had any occasion to correct any of his strokes. It is difficult to find, even in the second class of Grecian artists, any mark of a false stroke or random touch.

This reference to sculpture shows how a great master should use his tools. Sculpture has become a profession, and its votaries have established their academies of fine art in the various cities of Europe—in Rome, Florence, Carrara and elsewhere; and so also in Philadelphia and many American cities. The profession has its prizes and in its honors, its decorations and its specialties as the profession of medicine has. The modeler is a sculptor whether he actually cuts into the stone himself or not. Mr. French, of New York, who is the chosen sculptor of the statue to be placed on the dome of the new United States post office at Philadelphia, is a sculptor, even though, as is sometimes his habit, his work is mainly to create the model and he sees not the stone until the final finish is given by American or foreign hands. Modeling requiring genius, as does sculpturing. The modeler needs to be well versed in the human anatomy, else his model would prove a farce. The model, in one sense, is the tool for the sculptor; by it he gains attitude, proportion, poise, grace and ease of limb. But it does not contain that spark of life which the true sculptor gives to the dead marble. Shakespeare comprehended the sculptor's genuis when he wrote in Winter's Tale:

"I'll make the statue move indeed:"

and elsewhere,

"Statue spouting blood,"

and Dryden also, in his words,

"There, too, in living sculpture may be seen
The mad affections of the Cretan queen."

The soul of sculpture does not rest in the model; it is produced in the stone by the precision, accuracy, delicacy, and boldness of the touch and stroke. The model is but a tool from which to measure, and, after all, an *original* model of man is but a copy; for few modelers ever lived who did not have the human original. He cannot model the human figure from the eye or brain alone. He needs the human subject, just as the sculptor needs the clay model. The modeler can and does attitude the human subject to suit the conception of his own mind, and then copy his human study with his thumb and finger and tool in soft clay, adding, removing, altering,, and changing as he goes on with his work until his model seems finished; and even then, with new fancies, thoughts, and ideas he may correct, alter, or reform. Not so with the sculptor who is to reproduce the model in marble with the minutest exactitude, and to produce that glow of life which the mere model does not and cannot give. He cannot correct or reform an erroneous stroke. If he cuts too deep his labor is lost. Both the professional modeler and the professional sculptor possess a high order of genius, and, after all, each produces but *copies;* the copy of the model glows with life—the other is dead clay. When the model does its work it has done its full duty, and most frequently it lumbers up the studio, and is rarely found in the museum of art. Not so with the marble forms. They perish only by fire and vandalism and war; they live for centuries, even though buried in the remains of Nineveh.

The profession of statuary has attained high eminence in Europe, especially in Rome, Florence, and Carrara; and these cities now stand before the world in modern times,

where Athens stood in the ancient. It is taught theoretically and practically in the Academies of Fine Arts and in the studios of eminent professionals, as is the law in the universities of the land, and in the offices of attorneys. Owing to the fostering care of Congress, the love of the art has taken a deep root in our own country. Some of the choicest works of the sculptured art are to be found in all the cities of our States, many of them by eminent American artists abroad, and many by the most renowned of Italy. Sculpture and painting gild and refine civilization.

At least sixty thousand of eminent sculptured works adorn the museums of art and beauty of the world—they are recognized by name in the volumes of statuary lore. Where are now their models? History, to a large extent, has been buried in the ruins of Nineveh, Pompeii, and Herculaneum, and brought to life by unearthing the sculpture of ages long since passed. Their models have crumbled into dust.

Thus much has been said to show the value of both branches of the sculptor's profession, for in the present case it will be argued that the statuary of the "Two Boys" is not a professional production of a statuary or of a sculptor, because the same is not taken from an original model in clay.

*They are from antiques.* What matters it whether they were made from ancient model, or from ancient marble, or from modern marble, or modern clay models? All alike are but models. It matters not to the sculptor if his model be clay or marble.

The argument would be against the appellees if Congress had used the term "*original*" professional productions, but in its absence all they have to show is, that the "Two Boys," as well as the rest, are sculptured in the marble by professionals. What matters it whether the statue be reproduced from the Venus de Medici, or the Psyche of Phidias, or from the Greek Slave of Powers, or from the works of De Cori or Niccoli? The words of the law are, the "professional productions of a statuary or sculptor only." *All the works of a professional sculptor are profes-*

*sional productions.* No other construction can be made without violence to the law. Padula and Gemignani are professional sculptors, and they did all of the cutting upon the statuary; and it strengthens the case when we show that they were all executed in the studio of Pietro Salada—and under his direction also.

Had Powers produced two Greek Slaves, then by force of the argument of defendant, based on the word "original," attempted to be interpolated here, only one of these could be imported as a professional production—that is to say, that the second Greek Slave of Powers would not be the professional production of a statuary. The Act of Congress wisely omitted the word "original." The design of Congress has been to foster a love of art not only in American artists *residing abroad*, and studying, perfecting themselves in the greatest schools of art in the world, in Italy, by admitting his productions free of duty; but also to create and keep alive a taste for beautiful and exquisite statuary and paintings among our citizens, by the imposition of a trifling duty of ten per cent. If the appellant's law be admitted, the act, so far as our citizens are concerned, will be of little or no avail. The appellees stand upon the words of the law, and not upon the interpolation of the Treasury Department, which construction appellees hold, and confidently argues, is untenable.

Every work of a professional statuary or sculptor, without reservation, whether the same be a model or a statue, or other piece of sculptor's art; whether of an exalted order of merit or of the more humble; whether originals, or, copies of the new or the old is his professional productions. The main point is to ascertain if the statue is the professional production of a sculptor or statuary, and to be such the sculptor must be a professional sculptor.

In support of this position, let this question be propounded: If Powers reproduced the statue of Venus de Medici, would not that be the professional production of a statuary or sculptor? Or if Professor Steinhauser, of Rome, received an order to execute in marble a life-sized

copy of Canova's Three Graces. He executes the group perfectly in all its detail; would it not then be called in the art world, and out of it, the Three Graces of Canova by Professor Steinhauser? But under the argument of the Department at Washington, on the word *original*, this group, which has been finished with all the precision and knowledge due to art, by this eminent professor, is to be called a mere mechanical copy—just as though this celebrated artist was a mere mechanic. A painting on canvas is the professional production of an artist whether it be a copy or an original. There can be no distinction between a copy of a work on canvas and the copy of a work in marble, when both are professional productions, for none but a professional artist can produce *correctly* on canvas or in marble. Certainly the elegant groups and single figures copied from the famous antiques, but executed by eminent professional artists of this age, many of which are as well executed as are the originals, are to be classed as the professional productions of sculptors; and great violence would be done to art, and the artistic world would be shocked, to have them termed as mere mechanical copies of statues.

In a note to a decision (3,942, March 31, 1839), the department has defined what articles shall be admitted as the work of an artist under the provision which admits the productions of American artists free of duty. It is there held "that a statue in bronze or marble may be the work of an artist though the identical figure imported may have been cast or carved entirely by other hands than his own, if the model from which the figure was cut or carved was the creation of the artist." This decision implies that one here in this country who makes a model and sends it to Italy, to be cut in marble by a professional Italian sculptor, can enter the statute free of duty as his own professional production. Indeed, this is straining the law in favor of American artists residing here. The model only is his production, and the marble statue is the *production of the professional sculptor who sculptured it.* It is but a copy of the model. The modeler cannot certainly call the marble work his produc-

tion. It would be like the Three Graces of Canova by Professor Steinhauser.

We hold that according to the accepted terms of art, that the *professional productions of a sculptor are the statues which he executes in marble, whether copies or originals; and when the sculptor models, and models alone, his model is his professional production.*

The professional productions of a sculptor in marble are considered fully as important in the art world, if not more so, than the model in clay. When an observer acquainted with the rules of art gazes on a clay model, he is not able to decide whether the maker of the model can reproduce it in marble, as is the duty of a professional sculptor. But when the same observer looks upon a *marble statue*, he knows at *first sight*, that the sculptor of the statue is fully capable of making a model; for a sculptor can, and must, be a modeler, but a modeler may, or may not, be a sculptor. The principal use of the model is to secure the proportions and the dimensions in the marble in all its parts, of his idea, put the finishing touches to a statue, give it life and beauty; and these can only be imparted to the marble by the professional sculptor, and not by one who never touches the carving tool, but devotes himself entirely to the art of modeling; and we feel assured that the law, in its generous expression, was intended to cover all statues or other professional work executed by a professional sculptor.

The decision of the Department "that a statue in bronze or marble may be the work of an artist, although the identical figure may have been cast or carved entirely by other hands than his own, if the model from which the figure was cut or cast was the creation of the artist," implies that one here who makes a model and sends it to Italy, for instance, to be cut in marble by a professional sculptor, can enter the same at the Custom House here on its arrival as his professional production free of duty. This we claim to be a strange perversion of words of the law. It would not be *his* production in any sense in marble, but it would be the production of the professional sculptor who sculptured it.

An artist who creates a model (all of his own idea) of a beautiful subject is entitled to all the praise and credit as regards his model, or of the beauty or grandeur of his idea; but if from any cause he does not, or cannot sculpture from marble or execute the finishing touches to the statue, but obtains a professional sculptor to do so, assuredly the latter is entitled to *all* the credit for executing the statue, and it could not be called the professional production of the modeler. It would be *after* his model, but not his sculpture.

The decision of the Department referred to, is prejudicial to Italian and other foreign artists, for under the decision an American artist may go to Italy, open his studio, employ the best Italian sculptors to execute his models in marble, and then send them to this country as the productions of the American artist, free of duty; while the importers of Italian statues, natives of this country, would be obliged to pay fifty per cent. duty, according to the Department ruling in this present case, for the same statues perhaps, and executed by the identical Italians who executed the statues for the American modeler.

Antonio Canova, one of Italy's greatest sculptors, made in the year 1793 his famous group of Love and Psyche reclining, now to be seen in the Royal Palace of Compeigne, France. Then, in 1796, he repeated this same group for the Russian Prince Youssouppoff, and, as a matter of course, this second was a copy. In the year 1805 he, the said Canova, made the statue of Venus, coming from the bath, now in the Pitti Palace of Florence, Italy. From the same model two other statues were executed by him, one for the King of Bavaria, the other for the Prince of Canino. Here, therefore, are three statues of the Venus from the bath by that great sculptor, and we think any intelligent mind would pronounce them all to be works of art, and the professional productions of a sculptor, the original as well as the two copies. What would Canova say were he to arise from his grave and hear that the *Secretary of the United States Treasury had decided that copies* of works of art were not to be classed as works of art, and therefore that Canova's

group of Love and Psyche made in 1793, and his Venus from the bath in 1805, which is in the Pitti Palace, *were* his *professional productions*, but that *his* Love and Psyche, made in 1796, for the Russian Prince Youssouppoff, and his Venus from the bath, made for the King of Bavaria and the Prince of Canino, *were not* his professional productions and *not* works of art, but were manufactures of marble? Art should be encouraged in all its branches, and to exclude copies of antique statues would be injurious, for the reason that the antique is the universally acknowledged instructor of modern art. Now these original antique statues cannot be purchased. Why not, therefore, allow a copy executed by a professional sculptor, and which, perhaps, as far as form and finish go, might be as good as the original, to enter at ten per cent. duty, or the same as all works of art? Would not a fine copy of Canova's group of Love and Psyche, executed by a noted sculptor, be termed a group of "Love and Psyche, after Canova?" Would it not be a work of art—a professional production? A copy of a painting pays the same rate of duty as the original. It requires an artist to paint a picture, and it requires an artist to paint a copy. So it is with statuary, for it requires a modeler and sculptor to execute an original statue, and it requires a sculptor to made a copy. We repeat and think that Congress intended all statues in marble and stone should enter at the same rate of duty, when produced by professional sculptors.

But while this law was construed so as to make all *foreign artists* pay a duty of ten and fifty per cent., the Department has decided that an *American artist* can make a model of a figure or group in clay, send it, for instance, to Italy, and get an Italian sculptor to cut in marble from that model a statue, and have it brought here and passed through the Custom House, free of duty, as an American *professional production*, although it has been cut from *foreign marble* in a *foreign land*, and by a *foreign sculptor*, while, on the contrary, if the same Italian artist, who cut the statue in marble for the *American* artist, makes a model himself and cuts it in marble, he, the Italian sculptor, will have to pay ten per

cent. duty, providing the Department is satisfied the statue is an *original;* if not an original, fifty per cent. If American importers of statuary send orders to an Italian sculptor for statues in marble, they would have to pay ten per cent. or fifty per cent. duty, according to the decision of the Department; while American artists can have their statues cut by any one abroad and pay no duty to the *Government at all.* There is no objection to the American artist sending his model to a foreigner to get it cut in marble, if he chooses to do so; but let *him pay the same rate of duty as other dealers do*, for the artist who makes a model, and gets it cut in marble to sell and *not for the love of art alone*, is certainly carrying on a traffic in marble, precisely the same as the American importers, who bring from France and Italy their statues for sale, and are matters of commerce.

Again, suppose A, who is an American artist, makes a model in this country, and sends it to B, a sculptor in Italy, to be cut in marble for the American artist. In the meantime B, the Italian sculptor, makes in marble a statue from the model of some Italian sculptor for his own account. We will suppose that B, the Italian sculptor, ships both statues to the United States on the same vessel, namely, the statue he cuts for the American artist, and the statue he cuts for himself. When these two statues arrive here, the one cut for the American artist is *admitted free of* duty as *the professional* production *of the American* artist A. But the statue of B, the *Italian sculptor*, is taxed *fifty per cent.* duty. We here ask why does the Department demand fifty per cent duty from the Italian artist, and allow a copy of an American model made by the same foreign sculptor to come in free of duty.

It may be said that Congress many years ago allowed American artists to enter their productions free of duty, that is true, but it was done by Congress with the understanding that the American artist should *reside abroad*, and *there make his models* and *cut his statues.* At that time the law admitted *all statutes* at ten per cent. duty; consequently it made no difference, as copies as well as originals paid

ten per cent. But lately the words *residing abroad* have been *erased* by the Department by virtue of decision No. 3,942, and thus to allow an American artist to make *here* his models, and then send them to some foreign artist to be cut in marble, and brought back here as his *professional productions*. Such constructions are more for the encouragement of *sham art* than *real art*.

We call attention to the Circular of Instructions of October, 1876 (4,266), issued by the Treasury Department of the United States, and quote therefrom, namely:

"Invoices of statuary from foreign countries, to be admitted at a duty of ten per cent., *ad valorem*, therefore, must be accompanied by a certificate from the artist, declared to before a consular officer of the United States, showing that the former is a professional sculptor or statuary, wherever practicable. Where it is not practicable to obtain the certificate of the artist, as, for instance, where the consular officer is satisfied that the article is the work of an artist since dead, the consul should certify that he is satisfied that the figure was the work of a professional sculptor or statuary, and give the name of the artist."

Thus it appears the heirs and assigns even of the American sculptor can go on producing by foreign hands, in foreign lands, after his death, copies of statues without limit, free of duty. Thus we see again to what extent the law has been tortured to favor American artists, whose work is done by foreign hands, to the injury of foreign professional artists and importers of statuary.

Furthermore, to show *how great* the differential duties are between foreign and American professional productions. In accordance with the decision of the Department, defendant in error asserts that, under the said decision, the American artist, finding the original marble statue is popular and commands a good price, may order scores of copies, and enter them free of duty, while the foreign professional sculptor may only send his original at ten per cent; but for his copies of his own original fifty per cent. is exacted.

EDWARD SHIPPEN,
*Attorney for Defendant in Error.*

CIRCUIT COURT OF UNITED STATES,

EASTERN DISTRICT OF PENNSYLVANIA.

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VITI BROTHERS.

*vs.*

TUTTON, Collector.

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Copies, by modern artists, of ancient statutes, come within the meaning of Section 2,504, Schedule M., of the Revised Statutes, which provides that, paintings and statuary, not otherwise provided for, ten per centum, *ad valorem*.

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Opinion by McKennan, Cir. J. October 24, 1882.

This suit was brought to recover back alleged excessive duties exacted upon the importation of a number of pieces of statuary. A special verdict has been found, which presents the single question whether the duty imposed and paid is authorized by law.

This question is to be awarded by determining the meaning of Section 2,504, Schedule M., of the Revised Statutes, which is as follows: "Paintings and statuary, not otherwise provided for, ten per centum *ad valorem*. But the term statuary, as used in the laws now in force imposing duties on foreign importations, shall be understood to include professional productions of a statuary or sculptor only."

The object of the Act is, doubtless, to encourage a taste for art, and hence to admit the work of professional artists at a low rate of duty.

The plain meaning, then, of the words of the section, would seem to be that dutiable statuary shall include all the artistic work of a professional statuary or sculptor produced in the exercise of his profession.

But it is urged that only the artist who conceived the ideal of the corporealized image is entitled to the benefit of the low duty, and hence that the statuary or sculptor who has modeled the work which he or others have finished is alone within the category of the section.

We cannot accept this construction of the section, because it involves an arbitrary restriction of the common and well understood meaning of its words.

A sculptor is "one whose occupation is to carve wood, stone, or other material, into images or statues."

A statuary is "one who professes or practices the art of carving images or making statues."

The "professional productions" of a statuary or sculptor are the practical results of the practice of his profession or occupation; in other words, they are "images or statutes" produced by the exercise of his professional skill.

In this sense of the words of the statute, it clearly embraces all of the artistic work of a statuary or sculptor who pursues the employment of his class as a profession. We cannot otherwise construe them without wrenching them from their generally accepted signification. We cannot adopt metaphysical or speculative definitions of them which have this effect; nor can we change the meaning of the statute by injecting into it a word or words which the Legislature has thought proper to omit, and which is obviously necessary to authorize the construction contended for by the defendant.

All the statues described in the special verdict, except those of the Two Boys, are confessedly comprehended by either of the contested constructions of the statute, and are, therefore, subject to a duty of only ten per cent. *ad valorem.*

The Two Boys were executed from antique models, but they were the product of the labor and skill of professional sculptors, and hence were their "professional productions" within the purview of the law, and are subject to the same rate of duty with the others.

Judgment is, therefore, directed to be entered on the special verdict in favor the plaintiffs' for $242.40, with interest from March 30, 1880.